

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY ARTHUR ROBINSON,

Defendant-Appellant.

UNPUBLISHED

September 29, 2005

No. 254863

Macomb Circuit Court

LC No. 2003-003049-FH

Before: Fort Hood, P.J., and White and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of willfully and maliciously torturing an animal, MCL 750.50b(2), and sentenced to a prison term of eighteen to forty-eight months. He appeals as of right. We affirm.

I. Underlying Facts

On September 10, 2003, Mt. Clemens police responded to a report of a person injuring a dog. According to the police testimony, officers could hear an animal “yelping, screeching” as if in pain, and followed the loud noises to an industrial garage. As the police approached the garage, an officer observed defendant hanging a Rottweiler puppy “off the ground by a leash.” Defendant then slammed the dog onto the ground, and repeatedly kicked the dog’s “mid-section” and punched the dog in the head and shoulders. After defendant was arrested, an officer noted that the dog was “laid out” on the garage floor, “had difficulty breathing,” and was “[p]anting and kind of whimpering.” A veterinarian testified that the dog suffered, *inter alia*, head trauma, a right shoulder displacement, bone and teeth fractures, and several cuts.

II. Discovery

Defendant first argues that the trial court erred by denying his request for an in camera review of the responding police officers’ personnel records to determine whether they had previously been accused of perjury, which might support his claim that they “exaggerated” the charge in this case. We disagree. A trial court’s ruling on a discovery motion is reviewed for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). The trial court also has discretion to conduct an in camera review to determine whether records contain discoverable materials. *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996). Discovery should be granted where the information sought is necessary to a fair trial and a

proper preparation of a defense. *Id.* at 452. Even inadmissible evidence is discoverable if it will aid the defendant in trial preparation. *Id.* “In general, when a discovery request is made disclosure should not occur when the record reflects that the party seeking disclosure is on ‘a fishing expedition to see what may turn up.’” *People v Stanaway*, 446 Mich 643, 680; 521 NW2d 557 (1994) (citation omitted). “The burden of showing the trial court facts indicating that such information is necessary to a preparation of its defense and in the interests of a fair trial, and not simply a part of a fishing expedition, rests upon the moving party.” *Id.* (citation omitted).

The trial court did not abuse its discretion in declining to review the officers’ personnel files in camera for the purpose of determining whether they had previously been accused of perjury. *Phillips, supra*. When the trial court requested that defense counsel articulate what he sought from the personnel files, defendant counsel stated, “I don’t know what’s there.” We agree with the trial court that the request was “a fishing expedition,” there was “no articulation of a need to review,” and “[t]he fact that there is a claim that someone has perjured themselves is simply a claim.” Even on appeal, defendant has not demonstrated any factual support for his claim that the officers’ personnel files would contain helpful information, or were necessary to a preparation of his defense. Because defendant’s argument was based on speculation, the trial court correctly ruled that an in camera review of the officers’ personnel files was not warranted.

Further, because this is a discovery issue, we decline to address defendant’s claim that the prosecutor violated his constitutional due process rights based on *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). See *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001) (a court should avoid reaching a constitutional issue that is not necessary to resolve a case). This claim does not warrant reversal.

III. Sufficiency of the Evidence

Next, defendant argues that there was insufficient evidence to convict him of animal torture because there was no evidence of malice. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact’s role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The animal torture statute, MCL 750.50b(2), provides in pertinent part:

A person who willfully, maliciously and without just cause or excuse kills, tortures, mutilates, maims, or disfigures an animal . . . is guilty of a felony[.]

Defendant only challenges whether the evidence was sufficient to prove the requisite intent.¹ The animal torture statute is a general intent crime. *People v Fennell*, 260 Mich App 261, 268-269; 677 NW2d 66 (2004). Thus, defendant must have acted with “the intent to perform the physical act itself.” *Id.* at 266 (citation omitted). Intent may be inferred from facts in evidence, *Truong, supra*, and, because an actor’s state of mind is difficult to prove, only minimal circumstantial evidence is required. See *Fennell, supra* at 270-271; *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

The evidence established that, from a distance, an independent witness “heard loud cries of an animal being injured that were continuous” as if a dog was “in great agony,” and called the police. Subsequently, the police were able to locate defendant and the dog by following the loud noises of an animal “yelping, screeching” as if in pain. As the police approached an industrial garage, an officer observed defendant hanging a Rottweiler puppy “off the ground by a leash,” and slam the dog onto the ground. Defendant then repeatedly kicked and punched the dog. When the officers approached defendant, he was “very angry and irate,” and stated, “It’s just a dog, I’ll beat it.” After defendant was arrested, the dog lay on the garage floor, whimpered and panted, and had to be carried from the garage. The evidence demonstrated that, as a result of defendant’s actions, the dog suffered numerous injuries, including “bleeding into the whites of the eyes, most likely from head trauma,” “bleeding from the right side of the mouth, as well as his right nostril,” “numerous cuts,” “decreased lung sounds,” “a small fissure fracture in the right front leg,” bleeding from “the gum area,” and “several” fractured teeth.

From this evidence, viewed in a light most favorable to the prosecution, a rational trier of fact could reasonably infer all the necessary elements of the offense, including the requisite intent. Although defendant asserts that evidence supporting his conviction was weak, the jury was entitled to accept or reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). In sum, the evidence was sufficient to sustain defendant’s conviction of animal torture.

IV. Expert Witness

Next, defendant argues that the trial court erred by failing to appoint an independent expert to examine the animal. We disagree. Contrary to what defendant asserts in his brief, he did not move for the appointment of an independent expert to examine the dog, nor did the trial court refuse to appoint such an expert. Rather, defense counsel initially asked for the veterinary notes and indicated that an independent expert may be necessary based on the content of the notes. When defendant asked to replace his trial counsel based on the failure to seek an independent veterinary evaluation, defense counsel explained that, under the circumstances of treatment by four veterinarians, an independent expert would not provide “decent information.”

¹ Defendant contends that the evidence was insufficient because there was no evidence “that would tend to show directly that he was aware that his actions were wrong,” and “that there must be some evidence tending to show that he attempted to conceal his actions.”

Thus, the record reflects that not only did defense counsel not move for the appointment of an independent veterinarian, he acknowledged that an independent veterinarian was unnecessary. Accordingly, any objection in this regard was waived, and there is no error to review. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Consequently, this claim does not warrant reversal.²

V. Effective Assistance of Counsel

Defendant also argues that defense counsel was ineffective for failing to move to suppress his two “un-Mirandized” statements to the police. We disagree. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court’s review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant argues that defense counsel should have moved to suppress his statement to the police while he was being arrested. During an arresting officer’s direct examination, the following exchange occurred:

Q. And describe [defendant’s] demeanor when you arrived on the scene.

A. He was very angry and irate upon our contact with him.

² We nonetheless note that a defendant is entitled to the appointment of an expert at public expense only if he cannot otherwise proceed safely to trial without the testimony of the proposed witness. MCL 775.15. A defendant must show “a nexus between the facts of the case and the need for an expert,” and something more than “a mere possibility of assistance from the requested expert.” *People v Tanner*, 469 Mich 437, 443; 671 NW2d 728 (2003) (citation omitted). Here, defendant claims that an independent expert was needed to testify regarding the dog’s injuries in order “to dispute the allegation that he ‘tortured’ the dog.” But as previously indicated, an independent witness heard the dog’s “continuous screams” as if in “great agony,” police witnesses observed defendant hold the dog “off the ground by a leash,” and repeatedly kick and punch the dog, who had been injured to an extent that he had to be carried from the garage. Moreover, the medical records showed that four different veterinarians were involved in examining and treating the dog. Photographs of the dog’s injuries were admitted into evidence. Under these circumstances, there was an insufficient showing of the necessity for an expert.

Q. When you made contact with him, what happened, if anything?

A. Right after he laid down, his first words were, *Hey - and I quote, Hey motherf**kers, do you know who you're dealing with? It's just a dog, I'll beat it.*

Q. What happened next?

A. I started to handcuff [defendant] and place him under arrest. . . . [Emphasis added.]

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966); *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). But “[i]t is well established that *Miranda* warnings need be given only in situations involving custodial interrogation.” *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). A custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id.* Statements made voluntarily by suspects in custody do not fall with the purview of *Miranda*, and are admissible. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997).

Here, there is no dispute that defendant was not given his *Miranda* warnings before he made the challenged statement. However, there is no indication that the officers asked defendant any questions or performed any other action to induce the statement. Thus, defendant’s statement was not the product of custodial interrogation, but was volunteered. Because the statement was voluntary, a motion to suppress would have been futile. *Id.* Counsel is not required to advocate a meritless position. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant also argues that defense counsel should have moved to suppress his statement to the police made in response to police questioning. At trial, an officer testified that when he asked defendant “why [he] was beating the dog,” defendant stated, “it was training.” With regard to this statement, defendant failed to overcome the presumption that defense counsel’s decision not to move for suppression was a matter of strategy, or that counsel’s inaction affected the outcome of the proceedings. In fact, on the first day of trial, defense counsel noted that, although defendant wanted him to move to suppress the statement, it “is not all that inculpatory,” and that he “decided that rather than trying to keep it out, [he’d] attempt to use it in the trial . . . to further what [he] wanted to do in this case,” which included requesting a lesser included offense, disputing the element of malice, and exculpating defendant. This Court will not second-guess counsel in matters of trial strategy. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen by defense counsel failed to succeed does not constitute ineffective assistance of counsel. *Id.*

Moreover, it is unlikely that defense counsel’s failure to move to suppress the statement prejudiced defendant. There was compelling evidence presented at trial, including the detailed testimony of the police witnesses and the evidence of the dog’s injuries. Accordingly, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel’s alleged

inaction, the result of the proceeding would have been different. *Effinger, supra*. Therefore, he cannot establish a claim of ineffective assistance of counsel. Defendant is not entitled to a new trial.

VI. Sentence

We reject defendant's claim that he is entitled to resentencing because the trial court incorrectly scored the prior record variables of the sentencing guidelines. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision "for which there is any evidence in support will be upheld." *Id.* (citation omitted).

We need not address defendant's claim that the trial court impermissibly considered prior convictions that were beyond the ten-year gap provisions of MCL 777.50(1). Defendant raised this issue in this Court in a motion to remand and an amended motion to remand, and by written order, this Court denied defendant's motions. This Court's holding constitutes the law of the case with regard to defendant's scoring claim, and he has not shown that justice would not be served by application of the doctrine in this instance. See *People v Hermiz*, 235 Mich App 248, 254; 597 NW2d 218 (1999). Consequently, we decline to further review this issue.

We reject defendant's claim that the trial court relied on inaccurate information when scoring the prior record variables. The trial court was aware of defendant's challenges to the PSIR, and noted that the sentencing guidelines would remain the same. Further, the PSIR reflects that the court did, in fact, make specific notations for each of defendant's challenges. In sum, defendant has not demonstrated that the trial court relied on inaccurate information in determining his sentence, or that the PSIR actually contains inaccurate information. Consequently, defendant is not entitled to resentencing on this basis. MCL 769.34(10).

VII. Defendant's Supplemental Brief

A. Effective Assistance of Counsel

In a supplemental brief, defendant argues that defense counsel was ineffective for failing to call Officer Robert Hey to question him about a pending indictment for perjury, and for failing to cross-examine Officer Michael Kenel about a newspaper report indicating that he was accused of assaulting arrestees. Defendant contends that had defense counsel properly questioned these officers, it would have supported his defense that they "exaggerated" the charge in this case. We disagree.

Trial counsel's decisions concerning what witnesses to call, what evidence to present, and what questions to ask are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call [the] witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding." *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant contends that defense counsel should have called Officer Hey as a witness in order to question him about a charge that he lied to a grand jury. But defendant has not overcome the presumption that defense counsel's decision not to call Officer Hey was a matter of strategy. In fact, at trial, defense counsel stated that he "would not call" Officer Hey because "his testimony would be cumulative at best." Considering the independent witness' testimony regarding the dog's prolonged cries, the medical evidence of the dog's injuries, Sergeant James Ochmanski's testimony regarding his observations at the scene, and Officer Kenel's eyewitness testimony, providing another officer, i.e., Officer Hey, with the opportunity to reiterate defendant's actions and the dog's condition only to present Officer Hey's pending indictment for perjury, could have been more damaging than helpful to defendant's case. As previously indicated, this Court will not second-guess counsel in matters of trial strategy, and the fact that the strategy chosen by defense counsel failed does not constitute ineffective assistance of counsel. *Stewart, supra*.

Furthermore, it is unlikely that defense counsel's failure to question Officer Kenel about his having "been accused of assaulting arrestees" prejudiced defendant, i.e., affected the outcome of the trial. The fact that Officer Kenel had been accused of assaulting arrestees was of comparatively minor importance considering the totality of the evidence against defendant. See part III, *supra*. Defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Effinger, supra*. Therefore, he cannot establish a claim of ineffective assistance of counsel.

B. Jail Credit

Defendant's final claim is that he is entitled to 198 days of credit against his new minimum sentence for the time he served in jail before his sentence for the instant crime. We disagree. Whether defendant is entitled to credit for time served is a question of law that this Court reviews de novo. See *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995).

In *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004), this Court explained:

When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense. MCL 791.238(2).^[3] A parole detainee who is convicted of a new criminal offense is entitled, under MCL 791.238(2), to credit for time served in jail as a parole detainee, but that credit may only be applied to the sentence for which the parole was granted. *People v Stewart*, 203 Mich App 432, 433; 513 NW2d 147 (1994); 523 NW2d 631 (1994); *People v Brown*, 186 Mich App 350, 359; 463 NW2d 491 (1990). A

³ MCL 791.238(2) provides, in part:

A prisoner violating the provision of his or her parole . . . is liable, when arrested to serve out the unexpired portion of his or her maximum imprisonment.

parolee who is sentenced for a crime committed while on parole must serve the remainder of the term imposed for the previous offense before he serves the term imposed for the subsequent offense. MCL 768.7a(2).^[4]

Defendant correctly notes that a parole violator is not automatically required to serve the time remaining on his original sentence, up to the maximum, before he can begin serving his new sentence. See *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 571-572, 579-581; 548 NW2d 900 (1996). Rather, MCL 791.238(2) “requires the offender to serve at least the combined minimums of his sentences, plus whatever portion of the earlier sentence the Parole Board may, because the parolee violated the terms of parole, require him to serve.” *Id.* at 571-572, 584. Absent a showing that defendant has served the mandatory time for his prior sentence or that he was discharged from that sentence, credit for time served on the instant sentence would be inappropriate. See *People v Watts*, 186 Mich App 686, 690; 464 NW2d 715 (1991).

According to defendant, “because he was not given a sentence for parole violation, there was no sentence to which the 198 days credit could be applied.” Therefore, the 198 days should be applied against his sentence for the instant conviction. In support of that assertion, defendant presented handwritten responses from a representative of the parole board to a letter from counsel. We conclude, however, that the correspondence is insufficient to support his assertion that the trial court’s failure to grant credit against the sentence in the instant case, together with the parole board’s computations, resulted in his serving 198 days dead time. We are not persuaded that defendant is entitled to be resentenced.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Helene N. White
/s/ Peter D. O’Connell

⁴ MCL 768.7(a)(2) provides, in part:

If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.